As I have already said, the decision of this court in *Nagappa Rengasamy Pillai's* case was made on the assumption that the order made in court on reconsideration of the matter must be deemed to be an order in Chambers. Again to repeat what I have said, there can be no ground for such assumption, bearing in mind that the provision of rule 22A is a distinct and separate provision from that of rule 22. An order made in court on reconsideration of the matter, even though it may confirm the order previously made in Chambers, must be treated as a separate and distinct order from that made in Chambers. It would be an order made in court on the application of any person dissatisfied with the order made in Chambers. To apply to the judge to adjourn the matter into court for further argument is no different from the provision in the English Rules to move before the Judge in Court to set aside or discharge the decision, order or judgment made in Chambers. And an order on a Motion before the Judge in Court in a pending action would be an interlocutory order in court and not an interlocutory order in Chambers, so that subsection (2) of section 68 of the Act would have no application to it.

It was said in *Nagappa Rengasamy Pillai's* case by this court that the English authorities have no application to this matter by reason of the special provisions of section 31 of the Supreme Court of Judicature (Consolidation) Act, 1925. I agree with that statement but only to the extent that there is no provision in the English rules which is in *pari materia* with our Order 54, rule 22A. However, the corresponding provisions in the English rules dealing with appeals from a Judge in Chambers are substantially the same as under our rules. As has been pointed out by the learned Lord President in his judgment which has just been delivered, under the English rules an appeal lies to the Court of Appeal from any decision or judgment of a Judge in Chambers either with the leave of the judge or the Court of Appeal; or after an application to set aside or discharge the decision, order or judgment has been made to the judge sitting in court and has been refused. Thus no leave to appeal is required under the second alternative. The position under our rules, in my considered opinion, is exactly the same.

Reading subsection (2) of section 68 of the Act in conjunction with rule 22A, it would seem clear that leave to appeal is not required either if the judge issues a certificate that he requires no further argument or hears arguments in court and proceeds to make an order. The absurdity of the argument that leave is required even after a judge has made an order in court on reconsidering the matter after hearing further arguments lies in the fact that such reconsideration would thus not be considered even on par with a mere certificate that no further arguments are required for the purpose of such reconsideration.

For the reasons I have stated, I would venture to hold with all humility that *Nagappa Rengasamy Pillai's* case was wrongly decided. As the matter was not fully argued and the decision rested solely on the interpretation of subsection (2) of section 68 of the Act without regard being had to the provisions of Order 54, rule 22A of the Rules of the Supreme Court, 1957, it must be regarded as having been made per incuriam. I would therefore dismiss the first defendant's motion with costs.

Order accordingly.

SRI JAYA TRANSPORT CO. (P.T.M.) BHD. v. ANG CHAI HAI & ORS.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ong Hock Sim F.J.) May 31, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 134 of 1973]

Negligence — Collision between motor car and bus admitted to be due to negligence of bus driver — Driver of motor car killed in accident — Death due to extensive burns when car caught fire after collision with bus — Presence of tins containing petrol in boot of car — Submission that death of deceased was neither caused by nor the direct consequence of collision — Remoteness of damage — Intervening act — Plea of contributory negligence.

Practice and Procedure — Pleadings — Amendment.

This was an appeal against the judgment of the High Court ([1974] 1 M.L.J. 87). The deceased died in a motor accident when the motor car driven by him collided with a bus driven by a servant of the appellants. The dependants of the deceased brought a claim for damages. At the trial it was conceded that the collision between the two vehicles was due entirely to the negligence of the bus driver. It was however argued that the appellants were not liable for damages on the ground that the death of the deceased was neither caused by nor the direct cause of the collision. It was common ground that the deceased died of extensive burns when his car caught fire on collision with the bus and that at the time of the accident the deceased had inside and in the boot of the car a total of eleven four-gallon tins containing petrol. The learned trial judge entered judgment for the dependants of the deceased and the appellants appealed. On appeal the appellants relied largely on the chemist's "opinion that the fire was most probably caused by a spark igniting the petrol that was being carried in the deceased's car as a result of which he was burnt to death" as such evidence was not challenged and was the opinion of an expert. It was further argued that the carrying of tins of petrol, some not closed, in the car was evidence of contributory negligence.

Held, dismissing the appeal: (1) if reliance was to be placed solely on the chemist's report, there should have been an application to amend the pleadings;

(2) the learned trial judge was correct in holding that the presence of the tins or cans of petrol was not the cause of the fire and that the fire could not have been started by the petrol in the tins being ignited;

(3) as negligence was admitted in this case, the question of contributory negligence could not arise.

Case referred to:-

(1) *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] A.C. 218 at p. 238.

FEDERAL COURT.

N. A. Marjoribanks for the appellants.

David Tay Seow Hai for the respondents.

Ong Hock Sim F.J. (delivering judgment of the Court): This is an appeal from the decision of the High Court at Kuala Lumpur awarding damages, special and general, with interest thereon, to the respondents, the widow and two infant sons of Lance Corporal Yong Wai Kee of the Royal Malaysian Air Force who died in a motor accident on May 3, 1970.

At the material time, the deceased was driving motor-car No. BK. 433 along Jalan Lapangan Terbang in the direction of Kuala Lumpur, when motor bus belonging to the appellants coming from the opposite direction collided into the deceased's car while it was on its correct side of the road. It was a head-on collision. The Statement of Claim alleged that the negligence of the bus driver was the sole cause of the accident. The appellants in their Statement of Defence "admit the collision between the two vehicles but deny that their servant or agent was guilty of the alleged or any negligence" and further averred that the "collision was caused or contributed to by the negligence of the deceased" by reason of "carrying tins of petrol in the car when it was unsafe to do so".

At the hearing in the court below, it was conceded that the collision was caused by the negligent driving of the bus driver but liability was denied for the damages as claimed, *i.e.* loss of dependency and special damages, because the fact the car contained tins of petrol — a factor which caused the death — is not foreseeable. There was an intervening act between the impact and the death of deceased. Alternatively there is contributory negligence on part of deceased by carrying the petrol.

Before us, the appellants relied largely upon the Chemist's "opinion that the fire was most probably caused by a spark igniting the petrol that was being carried in the deceased's car as a result of which he was burnt to death as such evidence was not challenged and was the opinion of an expert" and further "that the carrying of tins of petrol, some not closed in the car, was evidence of contributory negligence".

The appellants asked therefore that this court apportion some blame to the deceased and reduce the damages accordingly.

It was our view that, if reliance was to be placed solely on the Chemist's Report, there should have been an application to amend the pleadings. As Lord Normand said in *Esso Petroleum Co. Ltd.* v. *Southport Corporation*: [1] "The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them" and associated himself with the observations of Lord Radcliffe who said at page 241: "My Lords, I think that this case ought to be decided in accordance with the pleadings" and at page 244: "In my view, where the question is, as here, as to sufficiency of evidence, the state of the pleadings is of more importance than the way in which the case is shaped in argument. It is clear that no application was made to the trial judge to amend the pleadings by altering or extending the particulars."

It was argued that petrol is a "dangerous matter" but we are satisfied it was not the deceased's handling of this dangerous matter that was the cause of the collision or accident. On authority it is quite clear that "dangerous animal" or "dangerous matter" is handled at the risk of the person harbouring the same or using it, and that he would be held liable for any negligence in regard thereto. In the instant case, all that is alleged is that the deceased's death was "*most probably* caused by a spark igniting the petrol that was being carried in the deceased's car as a result he was burnt to death". We have italized the words "most probably" and we do not consider that it was a considered opinion as no reasons were advanced. Photographs that could have assisted, with other evidence, as to the *source* of the fire, were not produced. It is suggested that the presence of the tins or cans of liquid in the car was the cause of the fire. Yet, as the learned judge concluded:

> "In the present case, there was only one collision and the deceased's car immediately caught fire burning him to death. It is submitted on behalf of the defendants that the Chemist Report Exhibit AB7 shows that the fire was most probably caused by a spark igniting the petrol that was being carried in the deceased's car, as a result of which he was burned to death. If so, then the death of the deceased was not the direct cause of the collision but that of the eleven tins of petrol which the deceased had in his car. However, the Chemist Report also makes the following findings:
>
> 'I examined the car and found it to be badly damaged and gutted with fire. Inside the car and in the boot of the car I found a total of eleven 4-gallon tins. One of the tins was closed and appeared to be full of liquid while the other tins were open and had varying quantities of liquid.
>
> I instructed Inspector Tan to collect samples of liquid from the tins and send them to the laboratory for analysis.'
>
> It is therefore established from the above findings that the petrol inside the tins was not totally affected by the fire. If the petrol was in fact the direct cause of the fire after the impact, then it would have been totally burnt out and there would have been no petrol left in the tins. Further, these tins should have been so badly affected by the heat that one would not have expected to find one of the tins, which was closed, to be still full of petrol. As pointed out by learned counsel for the plaintiffs, assuming that the fire had been put out by a fire-engine, then one would have expected to have found some water together with the petrol in the tins that were not closed, and therefore in the samples sent for analysis. But there is no evidence of any water found with the petrol in the Chemist Report. *I therefore find that these findings in the report do not support the conclusion that the fire was most probably started by the petrol in the tins being ignited* — assuming that the chemist did make such a conclusion in his report. It is common knowledge that vehicles do occasionally catch fire immediately after collision in a road accident, even if they do not carry any tin of petrol. It should be noted that this was a head-on collision. (See sketch plan Exhibit AB1). From the Chemist Report, the damaged front portion of the bus was also burnt. Under the circumstances, it is more probable that the fire had commenced from the engine portion of the car rather than from the eleven tins of petrol. In any event, there is no denying that the fire in this case was caused by a spark produced by the impact between the two vehicles which is the direct consequence of the bus driver's negligence. On the evidence, I find the petrol carried in the car did not therefore cause the fire which, to my mind, would in all probabilities have happened anyhow as a direct consequence of the collision. Thus, there was no *novus actus interveniens* in this case. In my view, there was no break in the chain of causation between the collision and his death."

We endorse the judge's view that the fire could not have been started by the petrol in the tins being ignited. There was a wind-shield, a roof or hood and side screens which in our view would make the suggestion that a spark ignited them most improbable.

Contributory negligence cannot arise in this case. As is correctly stated by the learned judge that "only comes into operation where the question of liability for negligence is in dispute. It is only in relation to the causation of the collision that one has to consider "contributory negligence".

For the reasons above, we are of the view that the appeal should be dismissed with costs, and we accordingly so order. The deposit will be paid out to respondents to account of taxed costs.

Appeal dismissed.

Solicitors: *Lovelace & Hastings; Murphy & Dunbar.*

ALLIANCE (MALAYA) ENGINEERING CO. SDN. BHD. v. SAN DEVELOPMENT SDN. BHD.

[F.C. (Azmi L.P., Lee Hun Hoe C.J. (Borneo) and Gill C.J. (Malaya) May 31, 1974]
[Kuching — Federal Court Civil Appeal No. 146 of 1973]

Practice and Procedure — Application for summary judgment — Sham defence — Leave to defend conditional upon payment into court of amount of plaintiffs' claim — R.S.C., 1957, O. 14, O. 19 rr. 19 & 27, O. 21 r. 1 & O. 25 r. 4.

In this case the appellants who were nominated sub-contractors had brought an action for $150,000 against the respondents for works carried out by them under the sub-contract. The appellants obtained judgment by default of defence but subsequently the respondents applied for the judgment to be set aside and obtained leave to defend the action. They then filed their defence together with a set-off and a counter-claim.

The appellants thereupon applied for the defence to be struck out on the grounds that the defence disclosed no reasonable defence and that the defence was frivolous and vexatious. This application was dismissed. The appellants then applied again for summary judgment against the respondents but the learned trial judge came to the conclusion that there were triable issues so as to entitle the respondents to unconditional leave to defend and he dismissed the application. The appellants appealed to the Federal Court.

Held: allowing the appeal, as in this case the defence put up by the respondents was a sham defence and there was very little substance in the respondents' claim to a right of set-off and counter-claim the learned trial judge should have granted the respondents leave to defend conditional upon their paying into court the amount of the applicants' claim.

Cases referred to:-

(1) *Dombey & Son* v. *Playfair* [1897] 1 Q.B. 368.
(2) *Anglo-Italian Bank* v. *Wells* 38 L.T.R. 197, 199.
(3) *Wallingford* v. *Mutual Society* 5 App. Cas. 685.
(4) *Ray* v. *Barker* 4 Ex.D. 283.
(5) *Shurmur* v. *Young* 5 T.L.R. 155.
(6) *Jacobs* v. *Booth's Distillery Co.* 85 L.T. 262.
(7) *Syn Lee & Co. Ltd.* v. *Bank of China* [1961] M.L.J. 87.
(8) *Cho Chin Huat* v. *Lee Boo Hock* [1970] 1 M.L.J. 112.
(9) *Lagos* v. *Grunwaldt* [1910] 1 K.B. 41.
(10) *Symon & Co.* v. *Palmer's Stores* [1912] 1 K.B. 259.
(11) *Esso Standard Malaya Bhd.* v. *Southern Cross Airways (Malaysia) Bhd.* [1972] 1 M.L.J. 168.
(12) *Shanghai Hall Ltd.* v. *Town House Hotel Ltd.* [1967] 1 M.L.J. 223.
(13) *Jaeger Co. Ltd.* v. *Prof. Dr. Jaeger* [1929] 46 R.P. 336.
(14) *Lee Sem Yoong* v. *Leong Yoong* [1967] 2 M.L.J. 86.
(15) *Dawnays Ltd.* v. *F.G. Minter Ltd.* [1971] 2 All E.R. 1389.
(16) *Frederick Mark Ltd.* v. *Schild* Times 21 October 1971; Solicitors Journal, 17.12.1971.
(17) *Bandar Raya Developments Bhd.* v. *Woon Hoe Kan & Sons Sdn. Bhd.* [1972] 1 M.L.J. 75.
(18) *Gilbert Ash (Northern) Ltd.* v. *Modern Engineering (Bristol) Ltd.* [1973] 3 All E.R. 195.
(19) *Dyson* v. *Attorney-General* [1911] 1 K.B. 410, 419.
(20) *Tio Chee Hing* v. *Tractors Malaysia Bhd.* [1973] 1 M.L.J. 66.

FEDERAL COURT.

S. F. Chong (*Mrs. Vohra* with him) for the appellants.

Patrick Tan for the respondents.

Gill C.J. (Malaya): This is an appeal by the plaintiffs in the action against the dismissal by B. T. H. Lee J. of their application in the High Court at Kuching for summary judgment against the defendants under Order 14 of the Rules of the Supreme Court, 1957.

The application included a prayer in the alternative that the defendants' defence be struck out (a) under RSC Order 21, rule 1 as being a mere denial, or (b) under RSC Order 25, rule 4 on the ground that it disclosed no reasonable answer and was frivolous and vexatious, or (c) under RSC Order 19, rule 19 on the ground that it was evasive and did not answer the point of substance, or (d) under RSC Order 19, rule 27 on the ground that it tended to prejudice, embarrass or delay the fair trial of the action, or (e) under the inherent jurisdiction of the court on the ground that it disclosed no reasonable defence, that it was frivolous and vexatious and that it was an abuse of the process of the court. The application under the prayers in the alternative was also dismissed.

The facts leading to the action out of which this appeal has arisen are as follows. By an agreement dated 27th January 1966 the defendants contracted to build for the Sarawak Government Phase I of a General Hospital in Kuching. By two agreements dated 21st March 1967 the plaintiffs became the nominated sub-contractors of the defendants for the supply and installation of kitchen and medical equipment respectively for the proposed General Hospital Building. The value of the works for the supply and installation of the kitchen equipment was $287,058 and that of the medical equipment was $540,510, making a total of $827,568 under the two nominated sub-contracts.

Clause 6 of each of the sub-contracts provided for the nominated sub-contractor, after the signing of the sub-contract and within 7 days of the receipt by him of a written notice from the contractor, to proceed with all reasonable despatch to execute and complete the nominated sub-contract works or the representative sections thereof within the period or respective periods specified in Part II of the Schedule to the sub-contract. There was a proviso to clause 6 of the agreement in the following terms:

"Provided that the nominated sub-contractor shall pay to the contractor as liquidated damages $5000/- per week for loss suffered and incurred by the contractor due to the failure of the nominated sub-contractor to complete within the said period or respective periods....."

Clause 7 of the agreement provided for the nominated sub-contractor, within a reasonable time after the receipt by him of the contractor's instructions, to make good all defects, shrinkages or other faults in the nominated sub-contract works which the contractor (whether at his own costs or not) was liable to make